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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955.

No. 694.

SAXONY CONSTRUCTION COMPANY,
Appellant,

v.

BOARD OF SUPERVISORS OF MARPLE TOWNSHIP,
Appellee.

Statement as to Jurisdiction.

Appeal from the Court of Quarter Sessions of Delaware County, Pennsylvania.

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STATEMENT AS TO JURISDICTION.

Appellant Saxony Construction Company submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Quarter Sessions of Delaware County, Pennsylvania, of June Sessions, 1953, Misc. Quarter Sessions Docket A-18, page 437.

THE OPINIONS BELOW.

The adjudication and decree nisi of the Court of Quarter Sessions of Delaware County, Pennsylvania, dismissing appellant's appeal from the order of the board of supervisors of Marple Township, and the opinion and final decree of that Court dismissing exceptions to the adjudication and decree nisi are not reported. Copies of the adjudication and the opinion of the Court of Quarter Sessions appear *infra* as Appendix A and Appendix B, respectively.

The opinion of the Superior Court of Pennsylvania dismissing the appeal to that court for want of jurisdiction to consider the case on its merits, is reported at 178 Pa. Super. 132, 113 A. 2d 342. A copy of the opinion appears *infra* as Appendix C.

BASIS OF JURISDICTION.

1. This is an appeal from a decision of the Court of Quarter Sessions of Delaware County, Pennsylvania, affirming an order of the board of supervisors of Marple Township. The order of the board of supervisors was made pursuant to authority granted by the Second Class Township Code of Pennsylvania, Act of May 1, 1933, P. L. 103, Art. XII-A, § 1206-A (as amended by Act of May 24, 1951, P. L. 370, § 16), 53 Purdon's Pa. Stat. § 19093-1256; Act of May 26, 1939, P. L. 235, § 1 (as amended by

Act of July 10, 1947, P. L. 1481, § 17), 53 Purdon's Pa. Stat. § 19093-1140. The board of supervisors imposed upon appellant the obligation to install a network of useless, dead-end sewer lines in a residential land development which was to be served by a complete system of on-site sewage facilities consisting of cesspools and septic tanks. In accordance with the procedure prescribed by the Second Class Township Code, *supra,* and the Act of July 18, 1935, P. L. 1299, § 1 (as amended by Act of July 10, 1947, P. L. 1481, § 17), 53 Purdon's Pa. Stat. § 19093-1141, an appeal was taken by appellant to the Court of Quarter Sessions of Delaware County, Pennsylvania.

2. The Court of Quarter Sessions of Delaware County, Pennsylvania, entered its adjudication and decree nisi affirming the order of the Board of Supervisors on December 18, 1953. On April 27, 1954, that Court handed down its opinion and final decree dismissing appellant's exceptions to the adjudication and decree nisi. An appeal to the Superior Court of Pennsylvania was dismissed on April 18, 1955. A petition to the Supreme Court of Pennsylvania for allowance of an appeal was refused on May 24, 1955. Appellant's petition to reconsider the refusal of the appeal from the Superior Court was denied by the Supreme Court of Pennsylvania on September 29, 1955. Thereupon the decision of the Court of Quarter Sessions of Delaware County became final. Notice of appeal to this Court was filed with the Clerk of the Supreme Court of Pennsylvania on December 21, 1955.

3. The jurisdiction of this Court, upon appeal, is conferred by 28 U. S. C. A. § 1257(2). Appellant challenged the validity of the order of the board of supervisors of Marple Township, a "statute of a state" within the meaning of that section of the Judicial Code, on the ground that it is repugnant to the Constitution of the United States.

The decision of the highest state court which passed upon the Federal question affirmed the validity of the order.

4. Cases believed to sustain the jurisdiction of this Court on appeal include:

(a) As to 28 U. S. C. A. § 1257(2): *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935); *Ex parte Williams*, 277 U. S. 267, 272, 48 S. Ct. 523, 526, 72 L. Ed. 877, 879 (1928); *Poulos v. New Hampshire*, 345 U. S. 395, 402, 73 S. Ct. 760, 97 L. Ed. 1105, 1112 (1953); *Atchison, Topeka & Santa Fe Ry. Co. v. P. U. C. of California*, 346 U. S. 346, 348-349, 74 S. Ct. 92, 94, 98 L. Ed. 51, 57-58 (1953).

(b) As to the time for appeal under 28 U. S. C. A. § 2101(c): *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 36-37, 14 S. Ct. 4, 6, 37 L. Ed. 986, 988 (1893); *American Ry. Express Co. v. Levee*, 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923); *Bowman v. Loperena*, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177 (1940); *Gorman v. Washington University*, 316 U. S. 98, 62 S. Ct. 962, 86 L. Ed. 1300 (1942).

5. The order of the board of supervisors of Marple Township, the "statute" involved within the meaning of 28 U. S. C. A. § 1257(2), has not been officially reported. It is recorded in the Marple Township minute book with the minutes of the regular monthly meeting of the board of supervisors held April 6, 1953, as follows:

> "The Board approved a revised plan for Section 'K' of Rose Tree Woods, by Saxony Construction Company with the conditions that standard improvements be installed throughout the tract and that sanitary sewers be placed in the streets to be capped until a trunk line is available with cesspools and septic tanks located advantageously for future sewer connections."

QUESTIONS PRESENTED.

1. What are the constitutional limitations upon the police power of a state as applied to the regulation of land development?

2. In the regulation of land development, may a state require a landowner to make burdensome improvements which are unrelated to the public health, safety and general welfare?

3. Is the legislative order of a municipality requiring appellant to install useless, dead-end sewer lines in the streets of its land subdivision so arbitrary and unreasonable as to be repugnant to the due process clause of the Fourteenth Amendment?

STATEMENT OF THE CASE.

1. *Facts.* Appellant Saxony Construction Company is the owner of a thirty acre tract of land in Marple Township, Delaware County, Pennsylvania. On April 6, 1953, it applied to appellee, the township board of supervisors, for approval of a plan for subdivision and development of the tract as forty-eight single-residence lots. The plan provided, inter alia, for installation of on-site sanitation facilities consisting of septic tanks and cesspools. Appellee refused to approve the plan unless appellant would in addition install useless dead-end sanitary sewer lines throughout the subdivision. Appellee did, however, permit construction and occupancy of the dwellings, served by septic tanks and cesspools alone in accordance with the subdivision plan submitted, on the condition that no streets or cartways will be completed until this appeal is finally determined.

There is no trunk sewer line in Marple Township to which the local sewer system in appellant's tract could be connected. The only existing trunk sewer line in the entire

drainage basin in which the tract is contained lies in another township, four miles away. This trunk line neither enters nor touches the borders of Marple Township. It is separated from Marple Township by the territories of two other townships. It was constructed and is owned and controlled by the Central Delaware County Sewer Authority, a municipal authority organized and controlled by certain municipalities in the county, but not including Marple Township. Although it has been contemplated that this sewer authority's system will eventually be enlarged to serve the entire drainage basin in which it lies, including that part of Marple Township containing appellant's tract, no official action of any kind has been taken to effectuate the extension of the sewer trunk lines to this area.

2. *Proceedings.* In accordance with Acts of May 1, 1933, P. L. 103 and May 24, 1951, P. L. 370, § 16, 53 Purdon's Pa. Stat. § 19093-1256, and Acts of July 18, 1935, P. L. 1299, § 1, May 26, 1939, P. L. 235, § 1 and July 10, 1947, P. L. 1481, § 17, 53 Purdon's Pa. Stat. §§ 19093-1140, 19093-1141, an appeal was taken by appellant from the order of appellee to the Court of Quarter Sessions of Delaware County.

The ground of the appeal to the Court of Quarter Sessions was that the order was arbitrary and unreasonable in that it bore no reasonable relation to the public health, safety and the general welfare, and, therefore, exceeded the municipality's lawful authority. In conformity to the practice in Pennsylvania of pleading factually, the petition to the Court of Quarter Sessions contains no reference to the due process clause of the Fourteeth Amendment. However, appellant's reliance upon the Fourteeth Amendment in taking the appeal appeared by necessary implication when it pleaded that the order was arbitrary and unreasonable. In Pennsylvania practice the courts recognize and apply the statutes and constitutional provisions applicable to the facts as pleaded.

In the course of the hearing on the appeal, the Court of Quarter Sessions recognized the constitutional issue in the following statements by the Trial Judge:

> "If this is so far out as to be nothing but arbitrary, then of course we would not sustain it, but you are going to have to go pretty far as far as I am concerned. You are going to have to show this is pretty unreasonable and it has no connection or relationship at all with the police power. . . ."[1]
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> * * *
>
> ". . . I don't see that this makes any difference because if this is a proper exercise of the police power the fact that they did or did not observe it some other place does not in any way affect the township's right to observe it now if they want to."[2]

That the decision of the Court of Quarter Sessions turned on the constitutional question appears in the following excerpt from its opinion:

> ". . . the answer to the problem is found in the fundamental law controlling the police power and its application to municipal improvements designed to protect the public health, safety, morals and welfare. The authority is recognized, but how it is exercised may at times be questioned."[3]

Upon the appeal to the Superior Court of Pennsylvania, both in oral argument and in the printed briefs, the principal argument was entitled "The Township's action exceeds the 'police power' and violates constitutional guarantees of freedom of use of property". The authorities cited included: *Euclid v. Ambler Realty Co.*, 272 U. S. 365,

1. Record certified to this Court by the Supreme Court of Pennsylvania, pp. 18-19. (Hereinafter referred to in these footnotes as "Record".)
2. Record, pp. 81-82.
3. Record, p. 174; Appendix B, *infra*, p. 25.

47 S. Ct. 114, 54 A. L. R. 1016, 71 L. Ed. 303 (1926), and *Truax v. Corrigan*, 257 U. S. 312, 338, 42 S. Ct. 124, 131, 66 L. Ed. 254, 265 (1921).[4] In its petition to the Supreme Court of Pennsylvania for allowance of an appeal from the action of the Superior Court, appellant stated the question as follows:

> "Does the action of the Board of Supervisors of Marple Township constitute a deprivation of Petitioner's property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, by imposing a condition upon Petitioner's use of its property which is arbitrary and unreasonable, bearing no reasonable relation to the police power?"[5]

In its petition to the Supreme Court of Pennsylvania to reconsider the refusal of an appeal from the Superior Court, appellant pleaded:

> "This case 'involves the construction or application of the Constitution of the United States' in the question, Was petitioner deprived of its property without due process of law by the imposition of onerous burdens upon its land development plan?"[6]

The Court of Quarter Sessions was the highest court to pass upon the constitutional question in this case. However, in order to determine that the decision of that court was the final decision on the merits, it was necessary to proceed through the Superior and Supreme Courts of Pennsylvania. The statute governing appeals from orders of the board of supervisors provides that the decision of the Court of Quarter Sessions shall be "final". Notwithstanding similar statutory provisions in other cases, the appellate courts of Pennsylvania have granted full review on

4. Briefs in the Superior Court of Pennsylvania certified to this Court, pp. 8-18.
5. Record, p. 188.
6. Record, p. 196.

the merits in a number of them. Appellant relied on this line of cases in taking its appeal to the Superior Court. The Superior Court, however, applied another line of cases construing similar statutory language and held that it lacked jurisdiction to consider the merits, including the constitutional question. Accordingly, the appeal was dismissed.

Until the decision of the Superior Court in the present case, which appears at 178 Pa. Super. 132, 118 A. 2d 342, the distinction between the two lines of cases, one granting full review and the other limited review of procedural regularity, appeared to depend upon the substantive rights involved. In those cases where property rights and questions of due process were to be determined, full review had been consistently given by the appellate courts. In cases involving mere privileges, review was limited to procedural matters. In no case had a full review been denied where constitutional issues were raised. The Superior Court, in its opinion, did not reconcile the manifest conflict between the two lines of decisions. Nor has any other decision in Pennsylvania done so.

Appellant then petitioned the Supreme Court of Pennsylvania for allowance of an appeal in reliance upon the Pennsylvania Act of June 24, 1895, P. L. 212 § 7(e), 17 Purdon's Pa. Stat. § 190, which makes an appeal from the Superior Court to the Supreme Court a matter of right in cases involving the application of the federal or state constitutions or the jurisdiction of the Superior Court. The petition to the Supreme Court was refused by order entered May 24, 1955. On June 16, 1955, on the recommendation of the Chief Justice, appellant filed with the Supreme Court of Pennsylvania a petition to reconsider its refusal of the appeal. After consideration the court denied the petition by order entered September 29, 1955. This order constituted a final determination that the Court of Quarter Sessions of Delaware County was the highest court in the State in which a decision on the constitutional questions in this case could be had.

THE FEDERAL QUESTION IS SUBSTANTIAL.

The order of the board of supervisors of Marple Township violates the due process clause of the Fourteenth Amendment. Building restrictions imposed by a municipal authority, like zoning regulations, are an interference with private property rights which can only be justified as an exercise of the police power. Such restrictions, if they bear no substantial relation to the health, safety or general welfare of the community, are repugnant to the due process clause of the Fourteenth Amendment. *Washington ex rel. Seattle Trust Co. v. Roberge,* 278 U. S. 116, 49 S. Ct. 50, 86 A. L. R. 654, 73 L. Ed. 210 (1928); *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 387, 47 S. Ct. 114, 118, 54 A. L. R. 1016, 1024-1025, 71 L. Ed. 303, 310 (1926); *Welch v. Swasey,* 214 U. S. 91, 105, 29 S. Ct. 567, 570, 53 L. Ed. 923, 929 (1909).

The order of the board of supervisors requires appellant to construct a network of sewer lines in the lots and streets of a residential development which is being served by on-site sewage facilities. There is no trunk sewer main into which these lines could empty, and they would, therefore, be utterly useless. It is for that reason an unconstitutional interference with appellant's property rights. Useless sewer lines cannot protect or promote the health, safety or general welfare. It may be *convenient* for the municipality to require the installation of such facilities in the course of constructing a development, rather than have them installed later when and if the municipality provides a trunk sewer system in the area. However, this Court has held that public convenience, unrelated to health or safety, will not support the use of the police power to require the private construction of expensive improvements. *Nashville, Chattanooga & St. Louis Ry. v. Walters,* 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935); *Chicago, St. Paul, Minnepolis & Omaha Ry. v. Holmberg,* 282 U. S. 162, 51 S. Ct. 56, 75 L. Ed. 270 (1930).

As applied particularly to appellant, the question is whether the order by appellee is an unconstitutional restraint upon appellant's freedom to use its property. In its full dimension, the question is whether states and local governments, in regulating land development and use, are in fact limited to such restraints as are substantially related to the health and safety of the general public, as the previous decisions of this court have held.

This is a period of rapid economic expansion. In the outlying areas adjacent to the urban centers and along the expressways, there is strong pressure for the conversion of agricultural land to residential, commercial and industrial uses. Throughout the country rural and semi-rural municipalities in these outlying areas are subjected to the almost explosive force of the expanding urban centers. Many such rural municipalities are meeting this force with understandable conservatism. They do not welcome the influx of city-dwellers and the concentration of housing, shopping facilities and other adjuncts of suburbia. They seek to halt the sudden multiplication of their population and the transformation of their rural countrysides. To this end they are resorting to more and more extreme measures. In the guise of regulating such obvious factors of health and safety as sanitary systems and density of development, they are imposing prohibitive burdens and restrictions upon land development. The purpose and effect of such regulation is not to safeguard the health and safety of the community, but to preserve the status quo. Regulation for this purpose clearly transgresses the proper boundaries of interference with the freedom of the individual in the use of his property. The fact that reasonable and appropriate controls over land development will inevitably interfere to some degree with the freedom of the property owner does not ipso facto invalidate the controls. That is an incident of the proper exercise of the police power. But there must be an unmistakable definition of the line between such constitutional regulation and the misuse of regulatory devices

to arrest normal and proper expansion of urban areas under sound and reasonable restraint. Since the *Seattle Trust Company, Euclid* and *Welch* cases, *supra,* increasing numbers of land owners have been subjected to such arbitrary and unreasonable burdens throughout the areas into which the cities are now expanding.

For these reasons the federal questions here presented are of very substantial proportions, within the meaning of *Zucht v. King,* 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922); *Milheim v. Moffat Tunnel Improvement District,* 262 U. S. 710, 716-717, 43 S. Ct. 694, 696, 67 L. Ed. 1194, 1199 (1923), and the rules adopted by this court.

CONCLUSION.

Appellant respectfully submits that this appeal brings before this court federal questions under the Constitution of the United States which are of far-reaching importance in terms of legal principles generally and of serious practical impact upon appellant as a landowner and upon landowners generally, and that the foregoing discussion demonstrates that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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